NTSB Order No.
EM-25

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 19th day of July 1972.

CHESTER R. BENDER, Commandant, United States Coast Guard,

vs.

JOE V. GOULART, Appellant.

Docket ME-26

OPINION AND ORDER

The appellant, Joe Victor Goulart, has appealed to this Board from the decision of the Commandant affirming the revocation of his license (No. 282855) as a master of fishing vessels, and all of his other seaman's documents, for committing a "violation of a statute."[1]

From December 30, 1969, to March 10, 1970, appellant was master of the HIGH SEAS, a fishing vessel of 367 gross tons, which was engaged on a tuna fishing voyage in the Pacific Ocean. The finding concerning the statutory offense was that persons "not qualified under 46 U.S.C. 224a served as mate or mates aboard the HIGH SEAS for the voyage in question."[2] Since the vessel set out

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[1]The Commandant's action was taken pursuant to 46 U.S.C. 239(g). The proceeding against appellant was "based exclusively on that part of...section title 239, which refers to a willful violation of any of the provisions of title 52 of the Revised Statutes or of any of the regulations issued thereunder...." 46 CFR 137.05-20(b). (Emphasis supplied.)

[2]46 U.S.C. 224a enacted as an amendment to Title 52 of the Revised Statutes (R.S. §4438a) on July 17, 1939. 53 Stat. 1049. It applies to all vessels documented under the laws of the United States, of 2000 or more gross tons (with certain exceptions not pertinent herein), while "navigating on the high seas." With respect to the violation found herein, the statute provides as follows:

on a long sea voyage without a mate, it was inevitable that unlicensed crewmembers would be repeatedly assigned to the deck watch as relief for the master, thus performing mate's duties in contravention of 46 U.S.C. 224a. Appellant showed conclusively that he neither hired nor assigned any duties to the crew aboard the HIGH SEAS. Nevertheless, on grounds that he was the master for all official purposes, and was presumed to have the master's traditional authority over the crew, appellant was held responsible for the unlawful assignments.

The Commandant's action followed appellant's prior appeal to him (Appeal No. 1858) from the revocation order of Coast Guard Examiner H. J. Gardner, who rendered the initial decision herein after a full evidentiary hearing.[3] Throughout these proceedings, appellant has been represented by his own counsel.

In his brief on appeal, appellant contends that the facts brought out at his hearing are similar to the factual situation in United States v. Silva,[4] where a Federal Court's ruling was contrary to the examiner's order. He seeks reversal of the order in reliance on the precedent, claiming that it is "completely dispositive of this appeal." Counsel for the Commandant has not filed a reply brief.

The ruling in the Silva case was that a fishing vessel owner is not chargeable under 46 U.S.C. 224a because his vessel "sailed short one mate." This determination was made as a matter of law, since the statute was construed as not prescribing manning requirements, "but only the licensing requirements of such officers as shall be aboard." The Court further found that the owner had indeed violated a regulation of the Commandant intended to

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> "...(4) No persons shall be engaged to perform, or shall perform on board any vessel to which this section applies, the duties of master, mate, chief engineer, or assistant engineer unless he holds a license to perform such duties..."; and
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> "(5) It shall be unlawful to engage or employ any person or for any person to serve as a master, mate, or engineer on any such vessel who is not licensed by the Coast Guard; and anyone violating this section shall be liable to a penalty of $100 for each offense."

[3]Copies of the decisions of the Commandant and the examiner are attached hereto.

[4]272 F. Supp. 46 (S.D. Calif., 1967).

implement the statute, namely 46 CFR 157.30-10. However, provisions in subsection (c)(2) thereof requiring a minimum of two deck officers aboard uninspected vessels "on a voyage of over 12 hours duration" were invalidated with respect to fishing vessels.[5] Fishing vessels are specifically exempted from such requirements under 46 U.S.C. 223, and, to this extent, the Court held that the regulation is "an unauthorized assumption of power" by the Commandant.

The operative facts of appellant's case indicate that there are two points of similarity to be considered. In both instances, the vessels were subject to all requirements of 46 U.S.C. 224a, and, in each instance, the vessels embarked upon sea voyages without a licensed person aboard to serve in the capacity of mate. Our case is nonetheless distinguishable, in that appellant was charged with engaging or employing unlicensed crewmembers to perform a mate's duties while the voyage was in progress.

Appellant and the chief engineer were the only licensed officers in the crew of the HIGH SEAS when the vessel departed from the port of San Diego, California, and during the entire time at sea. Some 2 months were spent in almost continuous fishing operations in the Pacific, on waters 300 to 600 miles off the Coast of Mexico, before the vessel returned to home port.[6] There were 12 other crewmembers, including a "fish captain," who was the son of the managing owner. He (the fish captain), by a distinct tradition observed among tuna fishermen, was the owner's constituted authority aboard the vessel and gave all orders. Under this regime, the appellant was at all times placed in personal charge of actual navigation and the positioning of the vessel. However, the deck watch to relieve him at other times, such as when the vessel was drifting, was rotated by the fish captain among the unlicensed crewmembers. This method of rotating the deck watch undoubtedly violated the statute. The question remains whether appellant

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[5]46 CFR 157.30-10(c)(2) provides that: "If an uninspected vessel engages on a voyage of over 12 hours duration, such vessel shall have a master, mate, chief engineer, and assistant engineer and such officers shall be in charge of their respective watches continuously, except [that a vessel] equipped with full pilothouse control of the propulsion machinery,...will not be deemed to be in violation of R.S. 4438a, as amended (46 U.S.C. 224a), when manned with an appropriately licensed master and mate who shall be in charge of their respective watches continuously, and an appropriately licensed chief engineer."

[6]The continuity of operations at sea was interrupted only twice by brief visits to Mexican ports for supplies.

should bear the sole responsibility. We agree with the examiner that he must do so, but also believe that there were mitigating circumstances which were not sufficiently considered.

We do not agree with the Commandant's finding that appellant had "abdicated" his authority in favor of the fish captain by entering a private agreement with the owners. Nothing in the record supports such a finding. Rather, as the examiner found, the tradition exists of appointing a fish captain as the "de facto" master aboard these vessels.[7] Moreover, we are not made aware of any statutory or regulatory proscription against the continuance of such a tradition.

Appellant's defense that he had no authority to hire the crew prior to the voyage and could do nothing to prevent the assignment of deck watches among unlicensed crewmembers while at sea was fully corroborated at the hearing by the managing owner and the fish captain. The latter also testified that he had made a prolonged, unavailing search for a master and a mate, after the former master had quit the vessel at the end of the previous voyage, and finally learned of appellant's availability about one week prior to sailing in this instance.[8] Appellant had just completed a foreign assignment and had never before served aboard the HIGH SEAS. During the interim period, he discovered that the fish captain did not possess a mate's license as he had supposed, and also that the local Coast Guard office would not grant a waiver to proceed on the voyage without a licensed mate. He thereupon consulted a representative of the Tuna Boat Association, where he was told not to be concerned since it was the managing owner's, rather than his, responsibility to hire the requisite number of officers.

The examiner rejected appellant's defense that he had no authority over the crew during the voyage, and had made conscientious efforts to resolve the problem of noncompliance with 46 U.S.C. 2242, which he had foreseen prior to the voyage. We agree, in view of all the circumstances, that appellant was not relieved of his responsibility, undertaken by virtue of his office and oath,[9] to assure such compliance during the voyage at sea. The Silva case was not concerned with unlawful assignments of

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[7]In the examiner's decision, it is described as "not at all uncommon" aboard fishing vessels in the tuna fleet to have a master who "is, in fact, a member of the crew under the direction of the `fish captain.'"

[8]Tr. 26-27.

[9]46 CFR 10.15-5(f).

unlicensed seamen to perform the duties of a mate during actual navigation on the high seas. Consequently, we find no reason for exculpating appellant on the basis of that precedent.

It is evident, however, that the judicial decision has placed fishing vessel masters, such as appellant, in a serious quandary. As applied herein, it enabled the vessel's managing owner to avoid any responsibility under the statute by listing no mate on the crew list. This was not considered as a mitigating factor, although the Commandant's decision concedes that "There was so much confusion attendant upon the Silva case that its actual precedental [sic] value is difficult to formulate."

Careful review of the record persuades us that a comparable sense of confusion existed with respect to appellant's understanding of the true extent of his responsibilities under 46 U.S.C. 224a. We share the view expressed in the final argument of the Coast Guard representative at the hearing, that appellant "was a victim of circumstances."[10] Moreover, we are persuaded that his offense did not stem from such willfulness as to imply a purposeful and obstinate disregard of the statute, but rather from a culpable degree of negligence on his part. Its gravity is thereby reduced and the sanction should be reduced commensurately.

We are further persuaded that appellant's suspension on probation in 1966 for the same type of offense, while serving as master of another fishing vessel, should not have been considered in aggravation. This took place prior to the creation of a changed relationship between the master and managing owner, with respect to their observance of 46 U. S. C. 224a, since the Silva case was decided in 1967.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appeal be and it hereby is denied except insofar as modification of the Commandant's order is provided for herein;

2. The revocation order of the Commandant be and it hereby is modified to provide for a suspension of appellant's license and seaman's documents for a period of 3 months;and

3. The record in this proceeding is reopened and the matter remanded to the Commandant for further proceedings in accordance

[10]Tr. 56.

with this opinion.[11]

REED, Chairman, McADAMS, THAYER, BURGESS, and HALEY, Members of the Board, concurred in the above opinion and order.

(SEAL)

[11]Counsel for the Commandant has advised that appellant has been granted a temporary license pending the disposition of his appeal to this Board, which expired on June 30, 1972. The time during which appellant has been actually deprived of his license since surrendering it to the examiner on July 1, 1970, shall be credited to the suspension period determined herein.